

AMENDED IN SENATE JULY 15, 2010

AMENDED IN SENATE JUNE 17, 2010

AMENDED IN ASSEMBLY APRIL 8, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

ASSEMBLY BILL

No. 2627

Introduced by Assembly Member Nielsen

February 19, 2010

An act to amend Sections 10115.1, 10115.4, 10115.10, and 10115.15 of the Public Contract Code, relating to state contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 2627, as amended, Nielsen. State contracts: participation goals.

Existing law establishes participation goals for certain state contracts with minority business enterprises, women business enterprises, and disabled veteran business enterprises. These provisions, with respect to minority and women business enterprises, were held unconstitutional on the basis of not meeting equal protection requirements.

The bill would also revise the requirements imposed on disabled veteran business enterprises to, among other changes, require a disabled veteran to have at least a 10% service-connected disability and require a disabled veteran business enterprise to submit specified income tax information to the Office of Small Business and Disabled Veteran Business Enterprise Services.

Existing law further requires an awarding state department for contracts for materials, supplies, or equipment to accept the submission by a bidder of a minority, women, or disabled veteran business enterprise utilization plan that has been approved prior to the solicitation due date

by the Department of General Services in accordance with certain criteria.

This bill would revise the minimum criteria for a business utilization plan to be approved by the Department of General Services, as specified. The bill would also expand the types of contracts to which these provisions apply to include contracts for commodities, property, goods, professional services, construction work, or equipment, including information technology goods and services.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 10115.1 of the Public Contract Code is
2 amended to read:
3 10115.1. As used in this article, the following definitions apply:
4 (a) “Awarding department” means any state agency, department,
5 governmental entity, or other officer or entity empowered by law
6 to enter into contracts on behalf of the State of California.
7 (b) “Contract” includes any agreement or joint development
8 agreement to provide labor, services, material, supplies, or
9 equipment in the performance of a contract, franchise, concession,
10 or lease granted, let, or awarded for and on behalf of the State of
11 California.
12 (c) “Contractor” means any person or persons, regardless of
13 race, color, sex, ethnic origin or ancestry, or any firm, partnership,
14 corporation, or combination thereof, whether or not a minority or
15 women business enterprise, who submits a bid and enters into a
16 contract with a representative of a state agency, department,
17 governmental entity, or other officer empowered by law to enter
18 into contracts on behalf of the State of California.
19 (d) “Disabled veteran” means a veteran of the United States
20 military, naval, or air service who has a service-connected disability
21 of at least 10 percent or more and who is domiciled in this state.
22 (e) “Disabled veteran business enterprise” means a business
23 that meets all of the following criteria:
24 (1) The business is at least 51 percent owned by one or more
25 disabled veterans, except that if the business is a limited liability
26 company, it is wholly owned by one or more disabled veterans.

1 (2) The daily business operations are managed and controlled
2 by one or more disabled veterans. For purposes of this paragraph,
3 the disabled veteran who manages and controls the business is not
4 required to be the owner of the disabled veteran business enterprise.

5 (3) The home office of the business is located in the United
6 States and is not a branch or subsidiary of a foreign corporation,
7 foreign firm, or other foreign-based business.

8 (4) The business has submitted the following income tax
9 information, as applicable, to the Office of Small Business and
10 Disabled Veteran Business Enterprise Services:

11 (A) Complete copies of its federal income tax returns for the
12 previous year after initial approval by the Department of General
13 Services. If in operation for less than three years, the business shall
14 submit its federal income tax returns for each year that it has
15 operated as a business.

16 (B) A business that is not a sole proprietorship and rents
17 equipment to the state shall provide its federal income tax returns
18 for each disabled veteran owner or the firm shall be deemed to be
19 an equipment broker.

20 (f) "Minority," for purposes of this section, means a citizen or
21 lawful permanent resident of the United States who is an ethnic
22 person of color and who is: Black (a person having origins in any
23 of the Black racial groups of Africa); Hispanic (a person of
24 Mexican, Puerto Rican, Cuban, Central or South American, or
25 other Spanish or Portuguese culture or origin regardless of race);
26 Native American (an American Indian, Eskimo, Aleut, or Native
27 Hawaiian); Pacific-Asian (a person whose origins are from Japan,
28 China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines,
29 Samoa, Guam, or the United States Trust Territories of the Pacific
30 including the Northern Marianas); Asian-Indian (a person whose
31 origins are from India, Pakistan, or Bangladesh); or any other group
32 of natural persons identified as minorities in the respective project
33 specifications of an awarding department or participating local
34 agency.

35 (g) "Minority business enterprise" means a business concern
36 that meets all of the following criteria:

37 (1) The business is an individual proprietorship, partnership,
38 corporation, or joint venture at least 51 percent owned by one or
39 more minorities or, in the case of any business whose stock is

1 publicly held, at least 51 percent of the stock is owned by one or
2 more minorities.

3 (2) A business whose management and daily operations are
4 controlled by one or more minorities who own the business.

5 (3) A business concern with its home office located in the United
6 States which is not a branch or subsidiary of a foreign corporation,
7 firm, or other business.

8 (h) “Women business enterprise” means a business concern that
9 meets all of the following criteria:

10 (1) The business is an individual proprietorship, partnership,
11 corporation, or joint venture at least 51 percent owned by one or
12 more women or, in the case of any business whose stock is publicly
13 held, at least 51 percent of the stock is owned by one or more
14 women.

15 (2) A business whose management and daily operations are
16 controlled by one or more women who own the business.

17 (3) A business concern with its home office located in the United
18 States which is not a branch or subsidiary of a foreign corporation,
19 firm, or other business.

20 (i) “Goal” means a numerically expressed objective that
21 awarding departments and contractors are required to make efforts
22 to achieve.

23 SEC. 2. Section 10115.4 of the Public Contract Code is
24 amended to read:

25 10115.4. In implementing this article, the awarding department
26 shall utilize existing resources such as the Office of Small Business
27 and Disabled Veteran Business Enterprise Services, the federal
28 Minority Business Development Agency, and the federal Small
29 Business Administration.

30 SEC. 3. Section 10115.10 of the Public Contract Code is
31 amended to read:

32 10115.10. (a) It shall be unlawful for a person or firm to:

33 (1) Knowingly and with intent to defraud, fraudulently obtain,
34 retain, attempt to obtain or retain, or aid another in fraudulently
35 obtaining or retaining or attempting to obtain or retain, acceptance
36 or certification as a minority, women, or disabled veteran business
37 enterprise, for the purposes of this article.

38 (2) Willfully and knowingly make a false statement with the
39 intent to defraud, whether by affidavit, report, or other
40 representation, to a state official or employee for the purpose of

1 influencing the acceptance or certification or denial of acceptance
2 or certification of any entity as a minority, women, or disabled
3 veteran business enterprise.

4 (3) Willfully and knowingly obstruct, impede, or attempt to
5 obstruct or impede, any state official or employee who is
6 investigating the qualifications of a business entity which has
7 requested acceptance or certification as a minority, women, or
8 disabled veteran business enterprise.

9 (4) Knowingly and with intent to defraud, fraudulently obtain,
10 attempt to obtain, or aid another person or firm in fraudulently
11 obtaining or attempting to obtain, public moneys to which the
12 person is not entitled under this article.

13 (5) Establish, or cooperate in the establishment of, or exercise
14 control over, a firm found to have violated any of paragraphs (1)
15 to (4), inclusive. Any person or firm who violates this paragraph
16 is guilty of a misdemeanor and shall be liable for a civil penalty
17 not to exceed fifty thousand dollars (\$50,000) for the first violation,
18 and a civil penalty not to exceed two hundred thousand dollars
19 (\$200,000) for each additional, or subsequent violation.

20 (6) This section shall not apply to minority and women business
21 enterprise programs conducted by public utility companies pursuant
22 to the California Public Utilities Commission's General Order 156.

23 (b) Any person who violates paragraphs (1) to (4), inclusive, of
24 subdivision (a) is guilty of a misdemeanor and shall be liable for
25 a civil penalty not to exceed five thousand dollars (\$5,000) for the
26 first violation, and a civil penalty not to exceed twenty thousand
27 dollars (\$20,000) for each additional or subsequent violation.

28 (c) Any person or firm that violates subdivision (a) shall, in
29 addition to the penalties provided for in subdivision (b), be
30 suspended from bidding on, or participating as either a contractor,
31 subcontractor, or supplier in, any state contract or project for a
32 period of not less than 30 days and not more than one year.
33 However, for an additional or subsequent violation the period of
34 suspension shall be extended for a period of up to three years. Any
35 person or firm that fails to satisfy the penalties imposed pursuant
36 to subdivisions (b) and (c) shall be prohibited from further
37 contracting with the state until the penalties are satisfied.

38 (d) The awarding department shall report all alleged violations
39 of this section to the Office of Small Business and Disabled
40 Veteran Business Enterprise Services. The Office of Small

1 Business and Disabled Veteran Business Enterprise Services shall
2 subsequently report all alleged violations to the Attorney General
3 who shall determine whether to bring a civil action against any
4 person or firm for violation of this section.

5 (e) The Office of Small Business and Disabled Veteran Business
6 Enterprise Services shall monitor the status of all reported
7 violations and shall maintain and make available to all state
8 departments a central listing of all firms and persons who have
9 been determined to have committed violations resulting in
10 suspension.

11 (f) No awarding department shall enter into any contract with
12 any person or firm suspended for violating this section during the
13 period of the person's or firm's suspension. No awarding
14 department shall award a contract to any contractor utilizing the
15 services of any person or firm as a subcontractor suspended for
16 violating this section during the period of the person's or firm's
17 suspension.

18 (g) The awarding department shall check the central listing
19 provided by the office to verify that the person, firm, or contractor
20 to whom the contract is being awarded, or any person or firm being
21 utilized as a subcontractor by that person, firm, or contractor, is
22 not under suspension for violating this section.

23 SEC. 4. Section 10115.15 of the Public Contract Code is
24 amended to read:

25 10115.15. (a) Notwithstanding Section 10115.2, when
26 awarding contracts for commodities, materials, property, goods,
27 supplies, professional services, construction work, or equipment,
28 including information technology goods and services, an awarding
29 department shall accept the submission by a bidder of a minority,
30 women, and disabled veteran business enterprise utilization plan
31 that has been approved prior to the solicitation due date by the
32 Department of General Services. A business utilization plan shall
33 be considered approved by the Department of General Services as
34 of the date submitted to the department so long as the plan meets
35 the minimum criteria established in paragraphs (1) to (11),
36 inclusive, and shall be valid for a period of one year, unless the
37 department has audited the utilization plan, as authorized under
38 subdivision (b), and disapproves it for reasons specified under
39 subdivision (c). The decision of whether to establish a minority,
40 women, and disabled veteran business enterprise utilization plan

1 shall be at the option of the vendor. If a bidder cites an approved
2 utilization plan in response to the minority, women, and disabled
3 veteran business enterprise participation requirements of a
4 solicitation that calls for 15 percent minority-owned, 5 percent
5 women-owned, and 3 percent disabled veteran-owned business
6 participation, then that utilization plan shall be considered
7 responsive to the participation goals of the solicitation document.
8 If a solicitation specifies higher participation goals than those in
9 the bidder's utilization plan, the bidder shall meet the goals in the
10 solicitation or submit an amendment to increase the percentage of
11 specified goals. At a minimum, the utilization plan shall include
12 the following information:

13 (1) A statement of the vendor's minority, women, and disabled
14 veteran business enterprise utilization plan, including the primary
15 objectives of the utilization plan.

16 (2) ~~If applicable, an~~ An explanation showing sufficient business
17 reasons why the vendor did not meet ~~minority, women, and~~
18 ~~disabled-veteran~~ *minority or women* business enterprise
19 participation goals set forth in the vendor's ~~minority, women, and~~
20 ~~disabled-veteran~~ *minority or women* business utilization plan
21 submitted to, and approved by, the Department of General Services
22 in the previous year. Further, if the vendor did not meet the
23 ~~minority, women, and disabled-veteran~~ *minority or women* business
24 participation goals in the previous year, the vendor shall also
25 identify remedial steps it will take to meet the goals in the current
26 utilization plan.

27 (3) A statement of the vendor's minority, women, and disabled
28 veteran business utilization goals for the succeeding year. At a
29 minimum, these utilization goals shall be equal to the statewide
30 participation goals set forth in subdivision (c) of Section 10115.

31 (4) Estimated total dollars to be contracted by the vendor with
32 the State of California.

33 (5) Total dollars, expressed as a percentage of the amount
34 estimated pursuant to paragraph (4), intended to be subcontracted
35 with each of the following:

36 (A) Minority business enterprises.

37 (B) Women business enterprises.

38 (C) Disabled veteran business enterprise.

39 (6) A representative listing of the products and services that the
40 vendor anticipates subcontracting, including direct and indirect

1 funding. An identification of the types of subcontracting and
2 overhead costs planned for minority, women, and disabled veteran
3 business enterprises.

4 (7) Direct and indirect costs, as related to disabled veteran
5 business enterprise participation, may be applied to business
6 utilization plan goals. For purposes of this paragraph:

7 (A) “Direct subcontract awards” are subcontracts that are
8 directly attributable to a specific state contract.

9 (B) “Indirect costs” are those which, because incurred for
10 common or joint purposes, are not directly related to a specific
11 contract. These indirect costs include, but are not limited to,
12 overhead, general, and administrative costs, such as employee
13 fringe benefits, health insurance, retirement contributions, janitorial
14 expenses, office supplies, landscaping, travel costs, accounting,
15 and security costs. These indirect costs shall not be used for
16 services and commodities of any direct subcontract award.

17 (8) The name of the individual employed by the vendor who
18 will administer the vendor’s utilization plan, including a description
19 of the duties of the individual.

20 (9) A description of the efforts that the vendor will undertake
21 to ensure that minority, women, and disabled veteran business
22 enterprises will have an equitable opportunity to compete for
23 contracts.

24 (10) A listing of the records and reports that the vendor will
25 maintain to demonstrate the practices and procedures that have
26 been adopted to comply with the requirements and goals of the
27 utilization plan.

28 (11) Affirmation that the vendor met the statewide minority,
29 women, and disabled veteran business enterprise utilization goals
30 for the previous year, if applicable.

31 (b) The Department of General Services shall conduct random
32 audits of the submitted business utilization plans to determine
33 compliance with this article, and shall retain on file all submitted
34 business utilization plans for auditing purposes. During any audit
35 of a submitted business utilization plan, the Department of General
36 Services may ask a vendor to submit a list of all the minority,
37 women, and disabled veteran business enterprises included as
38 subcontractors in the vendor’s business utilization plan for the
39 previous year. This information shall remain confidential. Nothing
40 in this section shall be construed to require the Department of

1 General Services to audit all of the minority, women, and disabled
2 veteran business enterprise utilization plans submitted by individual
3 vendors. The Department of General Services may establish
4 appropriate fees to cover the actual costs of conducting random
5 audits and retaining on file all submitted plans.

6 (c) (1) At any time, the Department of General Services may
7 disapprove a vendor's minority, women, and disabled veteran
8 business enterprise utilization plan for any of the following reasons:

9 (A) The business utilization plan fails to evidence a vendor's
10 intention to comply fully with the statewide minority, women, and
11 disabled veteran business enterprise goals for the succeeding year,
12 as indicated by failure of the business utilization plan to contain
13 the information specified in subdivision (a).

14 (B) The business utilization plan fails to evidence sufficient
15 business reasons for failure to achieve the minority, women, and
16 disabled veteran business enterprise goals set forth in a business
17 utilization plan submitted in the previous year, if applicable.

18 (C) The business utilization plan fails to evidence sufficient
19 remedial steps the vendor will take if the vendor did not meet the
20 minority, women, and disabled veteran business participation goals
21 in the previous year, if applicable.

22 (2) If a vendor's business utilization plan is disapproved, the
23 vendor may not submit a new business utilization plan to the
24 department for a period of one year from the date of disapproval.
25 Prior to disapproval of a vendor's business utilization plan, the
26 vendor shall be entitled to a public hearing and to five days' notice
27 of the time and place thereof. The notice shall state the reasons for
28 the hearing.

29 (3) A vendor that submits a minority, women, and disabled
30 veteran business utilization plan that is approved by the Department
31 of General Services, and that is subsequently awarded a contract
32 to which the vendor would not otherwise have been entitled, and
33 that fails to evidence intention to fully comply with the minority,
34 women, and disabled veteran business enterprise goals in the
35 business utilization plan, or fails to evidence sufficient business
36 reasons for failing to achieve the minority, women, and disabled
37 veteran business enterprise goals set forth in the business utilization
38 plan, shall:

1 (A) Pay to the state any difference between the contract amount
2 and what the state's cost would have been if the contract had been
3 properly awarded.

4 (B) In addition to the amount specified in subparagraph (A), be
5 assessed a penalty in an amount of not more than 10 percent of
6 the amount of the contract involved.

7 (C) Be ineligible to transact any business with the state for a
8 period of not less than three months and not more than 24 months.

9 Prior to imposition of any sanction under this chapter, the
10 contractor or vendor shall be entitled to a public hearing and to
11 five days' notice of the time and place thereof. The notice shall
12 state the reasons for the hearing.